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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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In the Matter of

DUKE ENERGY CORPORATION

Docket No's. 50-413-OLA,
50-414-OLA

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

(Catawba Nuclear Station, Units 1 and 2)

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S
MOTION FOR RECONSIDERATION OF CLI-04-29**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(e), Blue Ridge Environmental Defense League ("BREDL") hereby moves for reconsideration of CLI-04-29, the Commission's October 7, 2004, Memorandum and Order denying BREDL access to two classified guidance documents regarding the Design Basis Threat ("DBT") for protection of Category I fuel cycle facilities against sabotage and theft or diversion of strategic special nuclear material ("SSNM"). Reconsideration is warranted because the decision unlawfully reaches the merits of the case before an evidentiary hearing has been conducted. Therefore, the Commission has prejudiced BREDL's right to a full and fair hearing in this proceeding.

II. FACTUAL BACKGROUND

On February 27, 2003, Duke Energy Corporation ("Duke") filed a license amendment request ("LAR") seeking approval to test plutonium "MOX" fuel assemblies at the Catawba and McGuire nuclear power plants. Duke's LAR included a Security Plan Submittal, which revised the existing Catawba Security Plan to add measures to protect the plutonium MOX fuel from theft or diversion, as required by 10 C.F.R. § 73.20. These proposed measures were intended to be complementary to the existing Security Plan,

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which contained measures for protection of the Catawba nuclear power plant fuel against sabotage.

In the same submittal, Duke sought exemptions from several security regulations applicable to facilities possessing formula quantities of SSNM, including requirements related to physical barriers for vital areas and Material Access Areas (“MAAs”), the requirement to establish a Tactical Response Team, requirements related to armed guards at MAA access points, and search requirements for personnel and materials entering or exiting MAAs. Duke did not, however, seek an exemption from the DBT for theft or diversion of formula quantities of SSNM. *See* Memorandum and Order (Finding Need-to-Know by Intervenor Regarding Certain Classified Documents and Referring Ruling to Commission), slip op. at 3-4 (September 17, 2004) (hereinafter “LBP-04-21”).

BREDL filed several contentions challenging the adequacy of Duke’s Security Plan Submittal, including Contention 5, which disputed the adequacy of Duke’s exemption application. Blue Ridge Environmental Defense League’s Contentions on Duke’s Security Plan Submittal (March 3, 2004) (hereinafter “BREDL’s Security Contentions”). In particular, Contention 5 argued that if the exemptions were granted, Duke would not satisfy the DBT for protection of formula quantities of SSNM from theft. *Id.* at 17-18. Therefore, BREDL contended that the exemptions should not be granted. The Atomic Safety and Licensing Board (“ASLB”) admitted Contention 5 in Memorandum and Order (Ruling on Security-Related Contentions) (April 12, 2004).

The DBT for sabotage and theft or diversion of formula quantities of SSNM is described in 10 C.F.R. §§ 73.1(a)(1) and (2). In promulgating the regulation, the Commission withheld some of the details about the DBT from the regulations, and

instead set them forth in two integrally related guidance documents: "Design Basis Threat for Theft or Diversion Guidance" (hereinafter "DBT Guidance for Theft/Diversion") and "Design Basis Threat for Radiological Sabotage Guidance" (hereinafter "DBT Guidance for Radiological Sabotage").

Both of these guidance documents are classified. Therefore, in order to obtain the regulatory details contained in the guidance documents, BREDL requested access to them in a need-to-know request.¹ Blue Ridge Environmental Defense League's Request for a Need-to-Know Determination (August 26, 2004). Both BREDL's attorney and expert possess the requisite security clearances to examine these classified documents.

The ASLB granted BREDL access to the two guidance documents in LBP-04-21. At the same time, the ASLB also referred its decision to the Commission. *Id.*, slip op. at 2. On October 7, 2004, the Commission issued CLI-04-29, reversing LBP-04-21. The Commission upheld the dual need-to-know standard that the ASLB had applied in LBP-04-21, *i.e.*, that information is discoverable if it is reasonably calculated to lead to admissible evidence, but that access to of safeguards documents should be "as narrow as possible." *Id.*, slip op. at 5-6. In applying the standard, the Commission appeared to agree with the ASLB that the requested guidance documents are relevant under its general discovery standards. The Commission ruled that BREDL should not be given access to the guidance documents, however, on the grounds that (a) plutonium in the form of MOX fuel is not attractive to thieves; and (b) the guidance documents were never

¹ BREDL had also requested the same guidance documents at the outset of the security proceeding, but the ASLB ruled that BREDL had no "need to know" at the earliest stage of the litigation. Memorandum and Order (Ruling on BREDL Motion for Need to Know Determination Regarding Classified Documents) (February 17, 2004). Once the contention was admitted and discovery commenced, the ASLB began to apply a less stringent standard for establishing need-to-know. *See* LBP-04-21, slip op. at 10.

intended to apply to a nuclear power plant, and are therefore irrelevant to BREDL's case.

Id. at 8. Thus, the Commission concluded that the documents are "unnecessary" and "not useful" to BREDL. *Id.*

In a footnote, the Commission noted that in the interest of saving time, it had not requested any "special appellate briefs" from the parties; and that in the case of any "material misapprehension of law or fact," the parties were entitled to petition for reconsideration. *Id.*, slip op. at 3 n.10.

III. ARGUMENT

BREDL respectfully requests the Commission to reconsider its decision in CLI-04-29, because the Commission's ruling is both erroneous and prejudicial to BREDL, in a manner that does not appear to have been considered by the Commission when it issued the decision.

A. The Commission Should Reconsider CLI-04-29 Because It Has Unlawfully Prejudged BREDL's Case On The Merits.

It is well-established that at the threshold of an evidentiary proceeding, the Commission may not rule on the merits of a contention. *Sierra Club v. NRC*, 862 F.2d 222, 228 (9th Cir. 1988), citing *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 931 (1986); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 541 (1986); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819 (1985), *rev'd on other grounds*, *Limerick Ecology Action v. NRC*, 869 F.2d 719 (3rd Cir. 1989). The merits decision must await summary disposition or the completion of a trial. Moreover, even on summary disposition, the trial judge may not engage in a "weighing

of the evidence.” *Magan v. Lufthansa German Airlines*, 339 F.3d 158, 166 (2nd Cir. 2003).

Here, the Commission has refused BREDL access to critically important guidance documents, based on a set of factual determinations that go straight to the merits of this case. For instance, the Commission asserts that plutonium in the form of MOX fuel assemblies is “difficult for a terrorist to acquire and transport.” CLI-04-29, slip op. at 9. The Commission also states that “[b]ecause of its composition, form and low plutonium concentration, the MOX material is not nearly as attractive to potential adversaries from a theft and diversion standpoint as the material at the existing NFS and BWXT facilities.” *Id.*, slip op. at 8. The decision even contains the ultimate legal conclusion that stems from the Commission’s factual determinations regarding the attractiveness of MOX fuel to thieves:

[I]t is clear to the Commission that while Catawba would technically be a Category I facility, there is no rational reason for Catawba to have a significantly different level of security than is already existing at the reactor site. Therefore, dissemination to the intervenor of Category I security guidance that applies to the BWXT and NFS facilities would be unnecessary and inappropriate.

Id., footnote omitted.

All of these conclusions are merits determinations on issues raised by Contention 5, that should be saved for the hearing. The factual question of the attractiveness of plutonium MOX fuel to thieves is put into direct dispute by Contention 5. *See* BREDL’s Security Contentions at 18. Contention 5 also asserts a dispute on the ultimate question of whether the regulatory exemptions should be granted. *Id.* at 15.²

² The Commission also claims that using a MOX fuel assembly “to create a radiological dispersion device would be impractical and ineffectual.” *Id.* This is another factual pre-judgment on which the Commission should not have rested its decision. In any event, the

It is not lawful or appropriate for the Commission to reach the merits of a contention at the threshold stage, before the parties have had a chance to put on their evidentiary cases. It is also prejudicial to BREDL for the Commission to make factual determinations without giving the parties any notice of the facts on which it relies, or any opportunity to controvert those facts.

The Commission's decision is also prejudicial to BREDL because it necessarily depends on the very information that the Commission has withheld from BREDL. In order to make a determination that plutonium in the form of MOX fuel assemblies is unattractive to thieves, it is necessary to know the characteristics and capabilities of the thieves. The larger and more equipped the group of adversaries, the more feasible theft will be, and the more attractive the MOX fuel will be to thieves. The information contained in the withheld guidance documents is central to this determination, because it apparently includes the size of the hypothetical attack force. BREDL cannot make an effective evaluation of this issue, or respond to arguments by Duke and the Staff, if it is denied access to the information in the guidance documents.

Finally, the Commission's merits determinations in CLI-04-29 raises a serious question as to whether BREDL can obtain a fair hearing before the NRC on Contention 5. If the Commission has already decided that Duke's request for exemptions from the Category I security regulations should be granted, then there is a legitimate question as to what is left to litigate. In a footnote, the Commission vaguely states that the ASLB is left to determine "whether the specific measures Duke has proposed are adequate to protect

purpose of the NRC's security regulations is to prevent theft of formula quantities of SSNM. The regulations do not contain any criteria that base the degree of required security on the ease of converting stolen SSNM to a weapon.

the public health and safety.” *Id.*, slip op. at 9 n.34. The contention, however, challenges the lawfulness of Duke’s exemption request. CLI-04-29 creates the improper appearance that the Commission has unilaterally amended the contention to remove BREDL’s challenge to the requested exemption application.

B. The Guidance Documents Are Relevant Because They Describe the Details of the Design Basis Threat.

The Commission claims that the requested guidance documents are not relevant because they apply to a different kind of facility than the Catawba nuclear power plant, *i.e.*, a large fuel cycle facility. CLI-04-29, slip op. at 10. In support of its position, the Commission states that when the NRC issued the requested guidance documents in 2000, “it did not intend those guidance documents to cover or address a power reactor licensee’s possession and use of already fabricated MOX fuel.” *Id.*, slip op. at 8-9. The Commission should reconsider this ruling, because it is illogical and inconsistent with the introductory language of the guidance document that is quoted by the ASLB in LBP-04-21; and because it implicitly relies on a prejudgment of the ultimate factual and legal issues in this case.

First, the Commission’s ruling is illogical. Pursuant to 10 C.F.R. § 73.20, there is only one factor that determines whether the DBT for theft applies to a facility: the quantity of SSNM that it possesses. Even if the guidance documents were written for fuel cycle facilities rather than nuclear power plants, their primary concern must be with the characteristics of the adversary, not the characteristics of the plant.

Second, the Commission’s ruling is inconsistent with the introductory language of the guidance documents, which are quoted by the ASLB in LBP-04-21. That introductory language makes it clear that the purpose of the guidance documents was to

provide additional details about "selected characteristics of the adversary." See LBP-04-21, slip op. at 16-17. The NRC's regulations define the DBT for sabotage and theft/diversion in terms of the characteristics of the attacker, not the characteristics of the facility that is to be protected. Thus, the question of whether use of MOX fuel at a nuclear power plant was contemplated when the guidance documents were written is irrelevant to the question of whether BREDL has a need-to-know with respect to the documents. As discussed above, the guidance documents contain crucially important information regarding the size of the force of attackers, which is applicable to any Category I facility.

Finally, the Commission's ruling is based on a prejudgment of the ultimate issue in BREDL's case, *i.e.*, whether the requested exemptions should be granted. While the Commission concedes that Catawba "technically" will be a Category I facility when it has the MOX fuel, it asserts that the "circumstances" at Catawba will be different than at the other two existing Category I facilities, NFS and BWXT. *Id.*, slip op. at 8. In other words, in the Commission's view, the exemption should be granted and the Category I security requirements in 10 C.F.R. Part 73, including Commission guidance for implementation of those requirements, should not be applied to Catawba. If there are physical characteristics of MOX fuel or the Catawba site that make it inappropriate to apply the Category I security regulations and related guidance, however, that is a factual determination that should await a hearing on the merits. It is not appropriate to make that evidentiary determination in the context of a discovery dispute.

C. Disclosure of the Requested Guidance Documents Is Necessary to the Presentation of BREDL's Case on Contention 5.

In CLI-04-29, the Commission states its conclusion that the guidance documents requested by BREDL are neither "necessary" nor "useful." *Id.*, slip op. at 9. As discussed above at page 6, however, the guidance documents are essential to BREDL's ability to evaluate the attractiveness and vulnerability of plutonium MOX fuel to theft, because they provide critical details regarding the capabilities of the adversaries. These details apparently include information on how many adversaries are assumed to mount an attack on the facility. Without this information, it is not possible to evaluate the attractiveness or vulnerability of the MOX fuel assemblies to theft. Therefore, the Commission's determination that the guidance document is unnecessary is without basis.

The Commission also appears to place some weight on the fact that the guidance documents do not constitute binding regulations.³ As BREDL pointed out in its Request for a Need to Know Determination, however, NRC guidance documents generally illustrate the Staff's position as to how regulations should be complied with; and indeed are granted "considerable weight." *Consumers Power Co. (Big Rock Point Nuclear Plant)*, ALAB-725, 17 NRC 562, 568 and n.10 (1983). Thus, they are highly relevant. In this case, both LBP-04-21 and CLI-04-29 make it clear that the guidance documents for interpreting the DBT for Category I facilities have even higher status than ordinary regulatory guides, because they flesh out details of the regulations that would have been

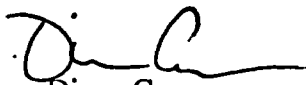
³ In addition, the Commission appears to attribute some unknown significance to the fact that Duke has "never seen" the guidance documents. *Id.*, slip op. at 8. Whether or not Duke has consulted the guidance documents is irrelevant to the question of whether BREDL has a need to know with respect to the guidance documents. Because the documents provide Commission guidance regarding the characteristics of the DBT against which Duke must protect the MOX fuel it possesses, BREDL has a need-to-know.

included in 10 C.F.R. § 73.1 had they not been considered too "sensitive." *See* LBP-04-21, slip op. at 16-17, citing introduction to DBT Theft/Diversions Guidance Document. Moreover, as revealed in CLI-04-29, the Commission did not leave preparation of the guidance document to the NRC Staff, but participated in the development of the guidance. *Id.*, slip op. at 7. Clearly, the Commission considers the guidance to be extremely important to the protection of Category I facilities.

IV. CONCLUSION

In CLI-04-29, the Commission unlawfully and inappropriately reached the merits of BREDL's case regarding Contention 5. In doing so, the Commission appears to have relied on a set of facts that are unknown to BREDL, and that have not been tested in the arena of an evidentiary hearing. As a result, it is now unclear whether BREDL can get a fair hearing on the contention. The Commission should rectify this error by making a need to know determination that does not resort to any weighing of the evidence or decisions on the ultimate issues in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2004, copies of the foregoing BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S MOTION FOR RECONSIDERATION OF CLI-04-29 were served on the following by e-mail and/or first-class mail, as indicated below:

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